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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF OREGON  
5 PORTLAND DIVISION

6 MART VAN DINE, )  
7 Plaintiff, ) No. 03:10-cv-00712-HU  
8 vs. )  
9 MICHAEL J. ASTRUE, ) **FINDINGS AND RECOMMENDATION**  
Commissioner of Social Security, ) **ON MOTION FOR EAJA FEES**  
10 Defendant. )  
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1 HUBEL, United States Magistrate Judge:

2       The plaintiff Mart Van Dine brought this action for judicial  
3 review of the Commissioner's decision to deny his applications for  
4 disability insurance benefits under Title II of the Social Security  
5 Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income  
6 under Title XVI of the Act. In Findings and Recommendation entered  
7 February 27, 2012, the undersigned recommended that the Commis-  
8 sioner's decision be reversed, and the case be remanded for further  
9 proceedings. Dkt. #25. Neither party filed objections, and on  
10 March 29, 2012, Judge Marco A. Hernandez accepted my recommendation  
11 and entered judgment for Van Dine. Dkt. ##27 & 28.

12       The plaintiff now moves for an award of attorney's fees under  
13 the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the  
14 amount of \$6,625.99. Dkt. ##29 & 31. The parties have stipulated  
15 to this amount as a compromise settlement. Dkt. #29. For the  
16 reasons set forth below, I recommend the motion be granted.

17       EAJA requires an award of attorney's fees to a prevailing  
18 plaintiff in a Social Security appeal, "unless the court finds that  
19 the position of the United States was substantially justified or  
20 that special circumstances make an award unjust." 28 U.S.C.  
21 § 2412(d). In the present case, based on my previous finding that  
22 the Administrative Law Judge erred in his evaluation of the  
23 evidence, I conclude that the defendant's position was not  
24 substantially justified, and thus an award of EAJA fees is  
25 appropriate.

26       Determining that a plaintiff is a "prevailing party" for  
27 purposes of an entitlement to EAJA fees is only the first step in  
28 considering a motion for EAJA fees. "It remains for the district

1 court to determine what fee is 'reasonable.'" *Hensley v.*  
2 *Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d  
3 40 (1983). The *Hensley* court observed that "[t]he most useful  
4 starting point for determining the amount of a reasonable fee is  
5 the number of hours reasonably expended on the litigation  
6 multiplied by a reasonable hourly rate," *id.*, which calculation  
7 results in a "lodestar." *Webb v. Ada County, Idaho*, 195 F.3d 524,  
8 527 (9th Cir. 1999) (citing *McGrath v. County of Nevada*, 67 F.3d  
9 248, 252 (9th Cir. 1995)). The lodestar may be adjusted to reflect  
10 the results obtained in the case. *Id.* (citing *Schwarz v. Sec'y of*  
11 *Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995)). The  
12 district court enjoys "considerable discretion . . . in determining  
13 what attorney's fee is reasonable." *Id.*

14 The court first will look at "the number of hours reasonably  
15 expended on the litigation." *Hensley, supra*. The time records  
16 submitted with the plaintiff's motion indicate the plaintiff's  
17 attorney expended 37 hours in this case (.80 hours in 2010, 35.7  
18 hours in 2011, and .50 hours in 2012). Preliminarily, the court  
19 notes that an expenditure of 37 hours falls within the twenty-to-  
20 forty-hour range Judge Michael W. Mosman found to be a "reasonable  
21 amount of time to spend on a social security case that does not  
22 present particular difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d  
23 1214, 1215 (D. Or. 2007) (noting "some consensus among the district  
24 courts" on this point; citing cases). Judge Mosman agreed that  
25 "[a]bsent unusual circumstances or complexity, . . . this range  
26 provides an accurate framework for measuring whether the amount of  
27 time counsel spent is reasonable." *Id.*

1 In the present case, the administrative record was 669 pages  
 2 long. The plaintiff's opening brief was twenty-one pages long, and  
 3 raised four issues requiring a detailed analysis of the ALJ's  
 4 treatment of the medical evidence in the case, the weight given to  
 5 the opinions of Van Dine's treating sources, and the ALJ's  
 6 credibility determination, as well as discussion of the applicable  
 7 law. The Commissioner responded with an eighteen-page brief, and  
 8 Van Dine filed a twelve-page reply. The complexity of the issues  
 9 and analysis of the evidence led to a 104-page opinion by the  
 10 undersigned, which is one of the longest opinions I have ever filed  
 11 in a Social Security case, due in large part to a complicated  
 12 medical history poorly analyzed by the ALJ. Counsel's time records  
 13 indicate the time he expended on the plaintiff's behalf in this  
 14 case was reasonable. None of the entries represents clerical or  
 15 secretarial tasks not payable under EAJA. *See, e.g., Gough v.*  
 16 *Apfel*, 133 F. Supp. 2d 878, 881 (W.D. Va. 2001) (noting that  
 17 "[p]urely clerical activities, regardless of who performs them, are  
 18 considered overhead and are not compensable as EAJA attorney  
 19 fees"). I therefore conclude that the total attorney time of 37  
 20 hours is reasonable under the circumstances.

21 In considering the applicable hourly rate, the statute itself  
 22 sets a \$125 per hour ceiling<sup>1</sup> "unless the court determines that an  
 23 increase in the cost of living . . . justifies a higher fee." 28  
 24 U.S.C. § 2412(d)(2)(A). To adjust for the cost of living, the  
 25 Ninth Circuit applies the national Consumer Price Index for All

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27 <sup>1</sup>Congress raised the rate for EAJA fees from \$75 to \$125 per  
 28 hour in 1996. The CPI-U index, all items, not seasonally adjusted  
 for 1996, was 155.7.

Urban Consumers (the "CPI-U"), not seasonally adjusted, and applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93 (9th Cir. 1993). The cost-of-living increase is "calculated by multiplying the \$125 statutory maximum hourly rate by the . . . CPI-U for the years in which the attorney's work was performed and dividing by the CPI-U figure for March 1996 (155.7), the effective date of the statutory maximum hourly rate." *Nadarajah v. Holder*, 569 F.3d 906, 918 (9th Cir. 2009) (citing *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005)).

The EAJA-adjusted hourly rate for 2010 is \$175.06<sup>2</sup>; for 2011 is \$180.59<sup>3</sup>; and for 2012 is \$184.95.<sup>4</sup> Multiplying counsel's hours for the respective years results in attorney fees of \$140.05 for 2010 (.80 hours x \$175.06); \$6,447.06 for 2011 (35.7 hours x \$180.59); and \$92.48 for 2012 (.50 x \$184.95); for a total of \$6,679.59 for all three years. This amount is \$53.60 more than the \$6,625.99 to which the parties have stipulated.

Accordingly, I recommend that the plaintiff's motion for EAJA fees in the amount of \$6,625.99 (Dkt. #29) be granted, and the plaintiff be awarded attorney's fees in that amount.

#### **SCHEDULING ORDER**

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due **October 8, 2012**. If no

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<sup>2</sup>\$125 x (2010 annual index of 218.056/155.7) = \$175.06.

<sup>3</sup>\$125 x (2011 annual index of 224.939/155.7) = \$180.59.

<sup>4</sup>\$125 x (2012 index for August, the most recently-available month, of 230.379/155.7) = \$184.95.

1 objections are filed, then the Findings and Recommendation will go  
2 under advisement on that date. If objections are filed, then a  
3 response is due by **October 25, 2012**. When the response is due or  
4 filed, whichever date is earlier, the Findings and Recommendation  
5 will go under advisement.

6 IT IS SO ORDERED.

7 Dated this 19th day of September, 2012.

8 /s/ Dennis J. Hubel

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Dennis James Hubel  
Unites States Magistrate Judge